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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Computer III Further Remand)

Proceedings: Bell Operating)

Company Provision of Enhanced)

Services)

CC Docket No. 95-20

COMMENTS OF THE
NEWSPAPER ASSOCIATION OF AMERICA

Respectfully submitted,

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SUMMARY

For the second consecutive time, the United States Court of Appeals for the Ninth Circuit has remanded the FCC's decision to eliminate the structural separation protection for Bell Operating Company ("BOC") enhanced services. The Commission should heed the signal from the Court and abandon its attempt to eliminate the structural separation requirement in favor of less effective non-structural "safeguards." The Commission should look carefully at *all* enhanced services -- not just voice mail -- in order to assess whether significant economies can be gained from integration and whether significant dangers are posed by such integration. This review should recognize that, in general, structural separation is the most effective, least costly regulatory safeguard available to guard against anticompetitive abuses by the BOCs. In particular, the non-structural safeguards identified by the Commission cannot be expected to provide an equivalent level of protection against access discrimination as is provided by a separate subsidiary requirement.

Accordingly, NAA urges the Commission to reject the proposal to weaken the protection provided by a requirement that the BOCs provide enhanced services through a separate subsidiary. Instead, the Commission should conduct a service-specific analysis of possible efficiencies and potential dangers of BOC provision of enhanced services. NAA submits that such an analysis will demonstrate the need to retain the structural separation requirement for most, if not all, BOC enhanced services.

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The Newspaper Association of America ("NAA"), by its attorneys, respectfully submits its comments on the Commission's *Notice of Proposed Rulemaking* ("NPRM") released February 21, 1995.¹ NAA is a non-profit trade association incorporated under the laws of the state of Virginia. NAA's 1500 members account for approximately 85 percent of the total daily newspaper circulation in the United States. Its members have always been major participants in the electronic information market, and are leaders in the provision of electronic publishing. Forty of NAA's members now offer online versions of their newspapers. In addition, NAA members offer a variety of other enhanced services, including audiotext services, online database services available through the InterNet and other services, and electronic classified advertising.

¹ FCC 95-48 (rel. Feb. 5, 1995).

NAA submits that, after two consecutive remands from the United States Court of Appeals for the Ninth Circuit, it is time for the Commission to abandon its attempt to eliminate the structural separation requirement for Bell Operating Company ("BOC") enhanced services operations. The Commission should look carefully at *all* enhanced services -- not just voice mail -- in order to assess whether significant economies can be gained from integration and whether significant dangers are posed by such integration. This review should recognize that, in general, structural separation is the most effective, least costly regulatory safeguard available to guard against anticompetitive abuses by the BOCs. In particular, the non-structural safeguards identified by the Commission cannot be expected to provide an equivalent level of protection against access discrimination as is provided by the use of a separate subsidiary.

Accordingly, NAA urges the Commission to reject the proposal to substitute less effective non-structural safeguards for the protection provided by a requirement that the BOCs provide enhanced services through a separate subsidiary. Instead, the Commission should conduct a service-specific analysis of the possible efficiencies and potential dangers posed by BOC enhanced services. NAA submits that such an analysis will demonstrate the need to retain the structural separation requirement for most, if not all, BOC enhanced services.

I. INTRODUCTION

On October 18, 1994, the Court of Appeals for the Ninth Circuit vacated and remanded, for the second time, the Commission's analysis of the costs and benefits of structural separation requirements.² The Court found the FCC's cost benefit analysis "flawed" primarily because the Commission had diluted its concept of Open Network Architecture ("ONA") so that it no longer required a fundamental unbundling of the network, yet had failed in the *BOC Safeguards Order* to acknowledge this change and to adjust its cost benefit analysis accordingly.³ In addition, the Court again criticized the Commission for failing to develop fully the alleged costs of structural separation,⁴ and warned that the efficacy of the Commission's new accounting safeguards "has yet to be proven."⁵ Accordingly, the Court vacated the Commission's *BOC Safeguards Order* in part and ordered "reconsideration of the cost benefit analysis with respect to structural separation."⁶

² *California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*).

³ *Id.* at 930.

⁴ *Id.* at 925.

⁵ *Id.* at 926.

⁶ *Id.* at 923.

II. THE COMMISSION SHOULD RETAIN A STRUCTURAL SEPARATION REQUIREMENT FOR SOME OR ALL ENHANCED SERVICES

The Court's remand requires the Commission to consider anew its entire analysis of the relative costs and benefits of structural separations and non-structural safeguards.⁷ In *Computer III*, the adoption of effective accounting safeguards and the implementation of a "self-enforcing" protection against discrimination in the form of fundamental unbundling of the BOC networks into basic "building blocks" were considered key prerequisites to a removal of the structural separation requirement. Experience since that order has shown that fundamental unbundling has not been achieved and may not be achieved in the foreseeable future. Moreover, recent experience with the BOCs' accounting practices suggests that even the strengthened safeguards adopted by the Commission cannot prevent systematic abuses of the rules by the BOCs. Accordingly, NAA urges the Commission to retain a structural separation requirement for some or all enhanced services offered by the BOCs.

A. Structural Separation is a Useful Tool To Protect Competition in Enhanced Services

The primary benefit of a structural separation requirement is that it promotes competitive parity. A BOC's enhanced services, if operated in a separate subsidiary,

⁷ The remand, therefore, is much broader than portions of the NPRM would suggest. See NPRM at ¶ 12 ("*California III* thus requires us to reexamine . . . the risk of access discrimination that result[s] from totally lifting structural separation requirements, given the current level of network unbundling").

are placed on an equal footing with those of all other enhanced service providers ("ESPs"). Like an independent ESP, the BOC affiliate must recruit, train, and support personnel who are not involved in the provision of the BOC's monopoly local services. Like an independent ESP, the BOC affiliate must procure its own equipment, office space, and other facilities to provide the service. Finally, like an independent ESP, the BOC affiliate must obtain services and access to the local exchange only to the extent such services are generally available to the public. With structural separation, the BOC affiliate is operated like an independent ESP, and it must act in the same environment available to other competitors, which means *without* the unfair advantage to be derived from exploitation of the local exchange.

Structural separation also aids the Commission's enforcement activities. If a BOC operates a separate enhanced services unit, it is easier to ensure that this unit obtains access in the same manner as is available to unaffiliated ESPs. Further, a separate subsidiary requirement enables transactions between the BOC and its affiliate to be separately identified. The transactions, then, are easier to examine to ensure they are conducted at arm's length, and are not the result of an improper bias.

B. Structural Separation Is Proposed or Employed With Respect to Other BOC Services

Some services, whether for regulatory, efficiency, or other business reasons, are best provided through separate subsidiaries. In recognition of this, use of a separate subsidiary has frequently been employed by Congress, the courts, the FCC and even

the BOCs themselves. For example, current proposals under consideration in Congress would require the BOCs to provide information services, long distance, cable TV, and manufacturing services through separate subsidiaries.⁸ In addition, the FCC is considering whether a separate subsidiary requirement is appropriate for video programming to be provided by a LEC through a video dialtone platform.⁹

Even the BOCs themselves recognize the appropriateness of separate subsidiaries in some contexts. For example, Ameritech's proposed MFJ waiver to provide interexchange service in the Chicago LATA includes a requirement that long distance be provided through a separate subsidiary.¹⁰ Similarly, a waiver request filed last July by Southwestern Bell with the Department of Justice proposes a separate subsidiary for Southwestern Bell's requested out-of-region long distance services.¹¹ Moreover, the BOCs' own voluntary enhanced service operations confirm the absence of any meaningful efficiencies for some services. First, at the time *Computer III* was adopted, several BOCs argued that integration should not be required, but rather that they should "be allowed to choose the most suitable structure for an enhanced service

⁸ See, e.g., S. 652 (104th Cong., 1st Sess.).

⁹ *Telephone Company - Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, Fourth Further Notice of Proposed Rulemaking, CC Docket No. 87-266, FCC 95-20 (rel. Jan. 20, 1995).

¹⁰ Ameritech, Motion for Waiver, Case No. 82-0192 (D.D.C. filed with the Department of Justice, December 7, 1993).

¹¹ Southwestern Bell, Waiver Request, Case No. 82-1092 (D.D.C. filed with the Department of Justice, July 11, 1994).

. . . on a case-by-case basis."¹² Further, in the CEI process, several BOCs proposed to provide some services primarily or partially through a separate subsidiary.¹³ Finally, other telephone-related ventures, such as yellow pages and directory publishing, are provided through a separate subsidiary by all but one BOC.¹⁴

Clearly, structural separation is an appropriate safeguard in certain contexts. The record in the prior remand showed that the FCC's decision to eliminate the requirement for all enhanced services was based solely on a conclusion regarding the BOCs' voice mail services. Significantly, however, the *California III* Court criticized the Commission for this superficial analysis of the costs of structural separation, noting its "concern" that the only concrete example of a cost of structural separation that was identified by the Commission was voice mail, to the exclusion of the wide array of enhanced services offered in the market.¹⁵ The Commission should not repeat this error by making another blanket generalization based solely upon the voice mail example. Instead, it should undertake a service by service review of structural

¹² Ameritech's Petition for Reconsideration at 6, *Computer III*, CC Docket No. 85-229 (Phase I) (July 13, 1987); see BellSouth Comments on Petitions for Reconsideration, CC Docket No. 85-229 (Aug. 18, 1987); Southwestern Bell Opposition and Comments Regarding Petitions for Reconsideration and Clarification, CC Docket No. 85-229 (Aug. 18, 1987).

¹³ See, e.g., Ameritech's Plan to Provide Comparably Efficient Interconnection to Providers of Line-Side Interactive Audiotex Services (F.C.C. Mar. 23, 1989).

¹⁴ All of the BOCs' 1994 yellow pages directories, except those published by Bell Atlantic, identified an entity other than the local operating company as the publisher of the directory.

¹⁵ *California III*, 39 F.3d at 925.

separation to determine whether integrated BOC operations serve any legitimate purpose for information services other than voice mail and to assess the suitability of the service for the protection provided by use of a separate subsidiary.

C. The Commission Should Not Generalize About the Cost of Structural Separation for All Enhanced Services

For many enhanced services, the provision of the service primarily involves features that do not enjoy any technical or economic benefits of integration with the local exchange. Where no significant benefits of integration exist, the cost of requiring the service to be conducted through a separate subsidiary would be minimal. For electronic publishing, for example, the primary work performed by publishers is the development and organization of the content of the information to be accessed. This function is distinct from the functions necessary to provide local service, and no significant efficiencies would be gained from the integration of this function with the BOCs' local exchange operations. Therefore, a requirement that electronic publishing be conducted through a separate subsidiary does not impose substantial additional costs on the BOCs.

A similar analysis should be conducted for each of the types of enhanced services available in the market. Particular emphasis should be placed on whether any technical efficiencies can be gained from integration of the service with the BOCs' networks. Claims of marketing or service efficiencies should be examined closely to ensure that the "efficiency" is not merely the opportunity to exploit the BOC's

monopoly position with respect to local service in order to gain an advantage in a peripheral, competitive market. NAA submits that in most cases, the claimed "cost" of structural separation will be the cost of foregoing an opportunity to enjoy an anticompetitive advantage.

Finally, the NPRM suggests that one-time expenses incurred by the BOCs in separating services which currently are provided on an integrated basis are "costs" of structural separation.¹⁶ NAA respectfully disagrees with this conclusion. The *status quo* for evaluating the costs and benefits of structural separation is the conclusion in *Computer II* that separate subsidiaries are required for BOC enhanced services.¹⁷ No valid order lifting this general requirement is in force at this time.¹⁸ It would be improper, therefore, to allow the BOCs to alter the cost benefit analysis in their favor as a result of their unilateral attempt to change the *status quo*.

¹⁶ NPRM at ¶ 40.

¹⁷ *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, 77 F.C.C. 2d 50 (1981); *see also Policy and Rules Concerning the furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies*, 95 F.C.C. 2d 1117 (1984) (*BOC Separation Order*).

¹⁸ The Commission recently requested a voluntary remand of the appeal of its orders lifting the structural separation requirement for each BOC, because *California III* "eliminated the necessary predicate for the Commission's action." *MCI Telecommunications Corp. v. FCC*, Joint Motion for Remand, No. 94-1597 (D.C. Cir. March 28, 1995).

D. There is Good Reason to Doubt the Efficacy of Non-Structural Safeguards

The *California III* Court expressly warned that the Commission's accounting safeguards have "yet to be proven."¹⁹ The Commission's recent action against Southwestern Bell Telephone lends additional force to the concern over the efficacy of accounting safeguards.²⁰ In *Southwestern Bell*, the Commission determined that for a period from at least 1989 to 1992 -- during which most of the Commission's accounting safeguards were in effect -- Southwestern Bell Corporation ("SBC"), the parent of the regulated LEC, charged its operating entity for significant amounts of SBC employee time which it could not substantiate, for it had failed to conduct a contemporaneous time study to allocate this time or even to create any timesheets or other records that would enable auditors to review these charges.²¹ Further, the Commission determined that SBC had substantially misallocated general costs by deliberately excluding most of (the parent) SBC's own costs, which, if properly allocated, would have reduced Southwestern Bell's share of general costs by nearly one-half.²²

As the above example illustrates, the accounting safeguards cannot prevent systematic and apparently deliberate abuses of the allocation methodology. Nor did the

¹⁹ *California III*, 39 F.3d at 926.

²⁰ See *Southwestern Bell Telephone Company*, Order to Show Cause, FCC 95-31 (rel. Mar. 3, 1995).

²¹ *Id.* at ¶ 7.

²² *Id.* at ¶ 18.

safeguards enable prompt detection of the abuses in that instance, which continued for several years without detection by the Commission.²³ Southwestern Bell's affiliates enjoyed the benefit of the improper allocation for three to six years, which, if repeated with respect to an enhanced service, would be more than long enough for such subsidies to have an impact on competition in the relevant market.

III. THE SAFEGUARDS IDENTIFIED IN THE NPRM DO NOT ADEQUATELY SUBSTITUTE FOR STRUCTURAL SEPARATION

The NPRM identifies several regulatory requirements adopted by the Commission and asks for comment on whether these requirements provide a sufficient protection against access discrimination by the BOCs. As described above, the best and proper course is to review individual services to determine whether adequate safeguards can be established, rather than to generalize regarding their effectiveness for all services in a manner that ignores the very real and significant differences between types of enhanced services. Nevertheless, there are significant reasons to doubt the effectiveness of each of the requirements even as a general safeguard for enhanced services. Further, even taken collectively, these requirements provide less protection than structural separation.

The primary limitations of each potential safeguard is described below.

²³ These violations were of the type that could not have been detected by Southwestern Bell's competitors because the detailed information necessary to review the data is not made publicly available.

A. Comparably Efficient Interconnection ("CEI")

As the *California III* Court emphasized, CEI is limited in scope.²⁴ First, a BOC's obligation to provide "comparably efficient" access is triggered only when it decides to offer a specific enhanced service on an integrated basis. That is, the BOC is not required to provide ESPs with CEI-quality access unless and until the BOC itself is ready and able to offer its own competing alternative. CEI does not open up the network in areas where the BOCs are unprepared with a competitive response. Second, CEI obligations only apply to the enhanced service actually offered by the BOC, not to similar or complementary services. Third, the obligations extend only to the particular network service elements actually used by the BOC to provide the service; they do not extend to other configurations that may perform the same functions.

These CEI limits undermine its utility as a protection against discrimination by the BOCs. The BOCs maintain control over the timing and scope of their CEI obligations, and this control can be manipulated to avoid providing needed interconnections to ESPs or to limit an ESPs' ability to provide particular service enhancements. Indeed, it is precisely this control that the Georgia Public Service Commission determined BellSouth had exploited to its advantage in *MemoryCall*.²⁵

²⁴ 39 F.2d at 927.

²⁵ *In the Matter of the Commission's Investigation into Southern Bell Telephone and Telegraph Company's Trial Provision of MemoryCall Service*, Docket No. 4000-U (Ga. PSC June 4, 1991).

As the *California III* Court explained, "The MemoryCall case shows that the BOCs have the incentive to discriminate and the ability to exploit their monopoly control over the local networks to frustrate regulators' attempts to prevent anticompetitive behavior."²⁶ The Commission's CEI requirements -- which were in effect at the time of BellSouth's actions -- failed to prevent this type of abuse and there is no reason to believe they would be any more effective in preventing future abuses.

B. ONA and the ONA Reporting Requirements

As the *California III* Court found, ONA has been diluted from its original conception by the Commission.²⁷ ONA does not enable an ESP to "pick and choose" network service "building blocks" to design its own enhanced services. Nor does ONA offer ESPs any new forms of access to the BOC network. The BSEs offered under ONA plans are, as the Commission acknowledged, largely a "repackaging" of forms of access that previously were available to ESPs. ONA has not empowered ESPs with new technological defenses to attempted discrimination. In effect, ONA is not significantly different from pre-ONA interconnection tariffs, which existed in an environment when a separate subsidiary requirement was considered necessary.

The decline of ONA as a potentially meaningful protection has been accompanied by a steady increase in the number of reporting requirements, monitoring

²⁶ 39 F.3d at 929.

²⁷ 39 F.3d at 928.

reports, disclosure obligations, and ONA plan amendment procedures. The substitution of paper filings for actual unbundling provides no relief for independent competitors. Indeed, the bevy of new paper procedures belies any claim that ONA can be a "self-enforcing" protection against discrimination and is a tacit admission that no meaningful change in the BOCs' ability to engage in discrimination has occurred. Also, there is no assurance that these additional paper requirements will be any more effective at controlling discrimination than previous Commission attempts to monitor the BOCs.

C. Expanded Interconnection

The NPRM suggests that the Commission's orders in the *Expanded Interconnection* proceeding²⁸ may achieve "some of the goals understood as 'fundamental unbundling' at the time of the *Computer III* proceeding."²⁹ Even if the actions ordered in *Expanded Interconnection* are considered "unbundling," they are not nearly broad enough to protect against access discrimination.

First, the primary beneficiaries of *Expanded Interconnection* are competitive access providers ("CAPs"), not ESPs. *Expanded Interconnection* opens special access and switched transport to possible competition, but does not provide access to the types of network services most useful to ESPs. An ESP does not have increased access to switching, signalling, or other network control functions as a result of this proceeding.

²⁸ See *Expanded Interconnection with Local Telephone Company Facilities*, Memorandum Opinion and Order, 9 FCC Rcd 5154 (1994).

²⁹ NPRM at ¶ 30.

Therefore, *Expanded Interconnection* does not provide any additional protection against discrimination in the provision of voice mail, alarm monitoring, or any other enhanced service where switching and signalling requirements predominate.

Second, the efficacy of "virtual" collocation of an independent provider's equipment as a substitute for physical collocation is unknown. It is not clear whether a BOC would be able to exploit its control over the terms of virtual collocation to the detriment of would-be interconnectors, much in the same way that the pre-divestiture Bell System used "protective coupling arrangements" to thwart competition in customer premises equipment.

D. Intelligent Networks

Whatever the potential benefits may arise from the *Intelligent Networks* proceeding, one thing is clear: the Commission's proposals have neither been adopted nor implemented, and therefore cannot be included in a current analysis of the costs and benefits of structural separation. *Intelligent Networks* is only a proposal; the Commission has not taken any action on its *Notice of Proposed Rulemaking*.³⁰ Moreover, the additional access contemplated is not even proposed to be required until one year after a Commission order adopting an Intelligent Network requirement.³¹

³⁰ *Intelligent Networks*, Notice of Proposed Rulemaking, CC Docket No. 91-346, 8 FCC Rcd 6813 (1993).

³¹ *Id.* at 6817.

Therefore, its benefits, whatever they may be, are distant and cannot be considered in the cost benefit analysis required on this remand.

E. "Market Forces"

Finally, the NPRM suggests that market forces, such as the presence of "well-established competing ESPs" can be counted upon as a substitute for other anti-discrimination safeguards.³² It should be noted, as an initial matter, that the problem of access discrimination is itself *created* by "market forces," pursuant to which a rational actor with monopoly control in one market would have an incentive to leverage that power to gain market share in adjacent markets where it did not presently have market power. Thus, one should not neglect the anticompetitive activities that can result from the reliance on "market forces."

In any event, the presence of large ESPs is not a deterrent to BOC exploitation of its power over the local exchange. Any ESP, large or small, is a potential victim of anticompetitive activity because it would be unable to stop the BOCs' exercise of market power. Further, it does not make economic sense for an entity, regardless of its size, to continue to participate in a market if one of its competitors can engage in a successful effort to leverage its monopoly power to impede competition in an adjacent market.

³² NPRM at ¶ 33.

F. The Combination of These Factors

Even considered collectively, CEI, ONA, *Expanded Interconnection*, *Intelligent Networks*, and "market forces" do not provide sufficient protection against access discrimination to justify the removal of the structural separation requirement. As shown above, none of these requirements alters the BOCs' incentive to seek to exploit its monopoly power to discriminate against enhanced service competitors. Without a change in the BOCs' incentives, they are likely to attempt to engage in such activities, unless meaningful controls are placed upon their ability to act upon their incentives. In the case of the requirements outlined above, there is no evidence that these requirements will materially affect the BOCs' ability to discriminate, either.

IV. CONCLUSION

For the foregoing reasons, NAA urges the Commission to reconsider its conclusion to eliminate the structural separation requirement. The Commission should initiate a review of each enhanced service proposed to be offered on an integrated basis to determine if any benefits of integration would result. NAA submits that for electronic publishing services, and for many other enhanced services, such a review

would indicate that few, if any, benefits are to be derived from removal of the structural separation requirement.

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